IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH: 'G': NEW DELHI)

BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER
AND
SHRI ANADEE NATH MISSHRA, ACCOUNTANT MEMBER

ITA No:- 3481 /Del/2015
(Assessment Year: 2006-07)

Shri Amit Arora, 201, Vipps Centre,-2-Community Center, Masjid Moth, G.K. II, New Delhi.	Vs	ACIT, Central Circle-22, New Delhi.
PAN No: ACAPA9659D		
APPELLANT		**RESPONDENT**

Revenue By : Shri S.S. Rana, CIT(DR)
Assessee By : Shri Salil kapoor, Adv. and
Shri Samarth Choudhari, Adv.

Per Anadee Nath Misshra, AM

(A) This appeal has been filed by the Assessee against the impugned appellate order dated 01.04.2015 passed by Learned Commissioner of Income Tax (Appeals)-29, New Delhi, ["Ld. CIT(A)",for short] pertaining to Assessment Year 2006-07, on the following grounds:

"1. That the notice issued and assessment order passed U/s 153A /143(3) is illegal, bad in law and without jurisdiction.

2. That the addition made by the AO are not based on any incriminating material found during the course of search. Hence assessment order passed

U/s 153A/143(3) and the additions/disallowances are illegal, bad in law and without jurisdiction.

3. *That in view of the facts and circumstances of the case, CIT (A) has erred in law in upholding the addition U/s 153A made by the AO as no incriminating document was found at the premises of the assessee during the course of search.*

4. *That the addition/disallowance made is unjust, arbitrary and is not based on any material on record. The CIT(Appeal) has erred in sustaining the addition of Rs 5,31,000/- out of addition of Rs. 7,77,648/-.*

5. *That in view of the facts and circumstances of the case, the CIT(A) has erred in law and on facts in upholding the addition of Rs.5,31,000/- U/s 69 of the act on account of Cheque deposited in the Standard Chartered Bank of the Assessee's minor son.*

6. *That the CIT (A) has failed to appreciate that deposit of Rs. 5,31,000/- in the Bank Account represent Gift from grandfather/ uncle of mother to the minor son and the same has been wrongly treated as income.*

7. *That the explanations given, evidence produced and material placed and made available on record have not been properly considered and judicially interpreted and the same do not justify the addition made.*

8. *That the addition made is based on mere surmises and conjunctures and the same cannot be justified by any material on record.*

9. *That interest U/s 234A 234B and 234C of the Income Tax Act, 1961 has been wrongly and illegally charged and has been wrongly worked out.*

10. *The Appellant craves leave to add, amend, alter and/or delete any of the above grounds of appeal at or before the time of hearing."*

(B) Original return of income was filed by the Assessee under Section 139(1) of the Income Tax Act, 1961 ("I.T. Act", for short) on 22.07.2006 declaring income of Rs. 5,77,411/-. A search and seizure action U/s 132 of the I.T. Act was carried out on 05.12.2007. At the time of search, no assessment proceeding was pending in the case of the assessee. Notice U/s 153A of I.T. Act was issued and the assessee filed return in response thereto, on 10.11.2008 declaring, again, the aforesaid

income of Rs. 5,77,411/- . Assessment order dated 30.12.2009 was passed by the Assessing Officer ("AO", for short) under Section 153A / 143(3) of I.T. Act, wherein, inter alia, addition of Rs. 7,77,649/- was made on account of unexplained deposits in Standard Chartered Bank in the name of the assessee's minor son. The assessee filed appeal before the Ld. CIT(A). Vide impugned appellate order dated 01.04.2015, the Ld. CIT(A) sustained an amount of Rs. 5,31,000/- out of the aforesaid addition of Rs. 7,77,649/- and deleted the remaining amount. This present appeal has been filed by the assessee against the aforesaid impugned appellate order dated 01.04.2015 of Ld. CIT(A).

(C) At the time of hearing before us, the Ld. Counsel for the assessee contended that no incriminating materials were found / seized at the time of aforesaid search and seizure action under Section 132 of I.T. Act and therefore the AO had no jurisdiction under Section 153A of I.T. Act to make the assessment, whereby the aforesaid additions were made. He further submitted that the issue on this point is squarely covered in favour of the assessee by order of jurisdiction High court in the case of *Kabul Chawla vs. CIT (2016) 380 ITR 573 (Delhi)*.

(D) We have heard both sides. We have also perused the materials available on record. There is no dispute between two sides about the fact that no assessment proceedings were pending in the case of the assessee on 05.12.2007, the date of search and seizure action U/s 132 of I.T. Act. It is also a fact that time limit for

service of notice under Section 143(2) of I.T. Act in respect of return filed on 22.07.2006. Thus, the Assessment Order dated 30.12.2009 under Section 153A of I.T. Act has not been passed after abatement of any pending assessment proceedings under second Proviso to Section 153A(1) of I.T. Act. There is also no dispute between the two sides that no incriminating materials were found / seized under aforesaid search and seizure action under Section 132 of I.T. Act. In these facts and circumstances, the issue, whether, the AO had the jurisdiction to make the aforesaid addition is squarely covered in favour of the assessee by Kabul Chawla vs. CIT (supra), and by order dated 25.04.2018 of ITAT, Delhi, in the case of H.B. N. Dairies & Allied vs. ACIT in ITA Nos.1393 to 1395/Del/2013, in which the aforesaid order of Hon'ble Delhi High Court in the case of Kabul Chawla vs. CIT (supra) was considered in detail. The relevant portion of the order of H.B. N. Dairies & Allied (supra) vs. ACIT is reproduced as under:

> *"6. I have heard both the sides and perused the relevant material on record. The short controversy is whether the loss declared by the assessee in its returns u/s 153A of the Act for the assessment years 2004-05 and 2005-06 at Rs.23,05,880/- and Rs.23,59,200/- respectively be carried forward and set off against the positive income for the assessment year 2006-07. The ld. AM has specifically recorded on page 15 of his proposed order that: "though no incriminating material relevant for assessment years 2004-05, 2005-06 and 2006-07 against the assessee, were unearthed during the course of search u/s 132 of the IT Act; but incriminating material relevant for other years referred to in clause (b) of section 153A(1) of the IT Act were indeed unearthed." He considered the judgments of theHon'ble Delhi High Court in the case of Kabul Chawla vs. CIT (2016) 380 ITR 573 (Delhi) and Smt. Dayawanti through Smt. Sunita Gupta & Anr. VS. CIT & Anr. (2017) 390 ITR 0496 (Delhi) and thus observed on pages 19 and 20 of his proposed order that when two precedents of equal strength from higher courts are available, 'the precedent which is closer to the facts of the case' should be preferred. Ex consequenti, he applied the judgment in the case of Smt. Dayawanti (supra) to hold that : 'even in respect of those assessment years in respect of which no incriminating materials was unearthed during search u/s 132 of the IT Act; and even if no assessments or re-assessments are pending for those assessment year (s) on the date of search u/s 132 of the IT*

Act; there is no obstacle in making addition u/s 153A of the IT Act provided some incriminating material in the case of the assessee for any assessment year (s) (referred to in clause (b) of section 153A(1) of the Income-tax Act) is unearthed as a result of search u/s 132 of the IT Act whether by statement u/s 132(4) of the IT Act or by way of undisclosed investment or by way of incriminating documents or in any other manner.' This is how, he held that the disallowance of loss claimed by the assessee for the assessment years 2004-05 and 2005-06 on the ground of claim of various expenses made by the assessee, not being fully verifiable, was in order. The ld. JM reiterated the fact that no incriminating material or document or evidence was found during the course of search in relation to such two assessment years and, hence, the loss so claimed for carry forward and set off should be allowed against the income for the A.Y. 2006-07.

7. It has been noticed above that search in this case was conducted on 20.11.2009. The assessment years under consideration are 2004-05, 2005- 06 and 2006-07. The assessee filed returns for these years originally u/s 139 at the material time. Whereas the return for the assessment year 2004- 05 was processed u/s 143(1) of the Act, assessments were completed u/s 143(3) in respect of the assessment years 2005-06 and 2006-07. The assessee's Profit & Loss Account for the assessment year 2004-05 shows incurring of expenses at Rs.95.21 lac against which loss of Rs.24.30 lac was computed and claimed in the return of income. The return of the assessee was processed u/s 143(1) determining loss at the declared figure. Profit & Loss Account of the assessee for the assessment year 2005-06 shows incurring of expenses at Rs.1.31 crore and the assessee filed return at a loss of Rs.23,59,200/-. After making some disallowance, the Assessing Officer completed assessment u/s 143(3) on 30.11.2007 at a loss of Rs.18.17 lac. In so far as the assessment year 2006-07 is concerned, the assessee filed return and the assessment was completed u/s 143(3) on 02.12.2008 determining Nil income, but charging tax u/s 115JB on book profit of Rs.10,90,440/-. Thus, it is evident that the assessments for the assessment years 2004-05 to 2006-07 stood completed on the date of search on 20.11.2009.

8. At this juncture, it is significant to note that when a search is conducted, there can be two types of assessment years, namely, completed assessments and non-completed or pending assessments. Assessment years having completed assessments mean the years for which either the assessments stood completed by the AO u/s 143(3) or section 144 before the date of search or the years for which the regular assessments were not taken up after the filing of the returns by the assessee and further that the time limit for issuing notice u/s 143(2) stood expired on the date of search.

9. As per the scheme under the Act, a return filed by the assessee is first processed by the A.O. u/s 143(1)(a) of the Act in which total income is computed after making the specified adjustments. As per clause (b), tax and interest, if any, is computed on the basis of the total income computed under clause (a). Clauses (d) and (e) of section 143(1) provide that an Intimation shall be sent to the assessee specifying the sum determined to be payable by, or the amount of refund due to, the assessee and the amount of refund due to the assessee in pursuance of the determination under clause (c) shall be granted to the assessee. Processing of the return u/s 143(1) and

the consequential issuing of Intimation is construed as passing of the assessment order except where a notice u/s 143(2) is issued for a scrutiny assessment u/s 143(3) of the Act. In a case, where notice u/s 143(2) is issued, the processing of return u/s 143(1) and the consequential issuance of Intimation does not amount to passing of the assessment order because the assessment order, in such circumstances, is passed after due scrutiny u/s 143(3) of the Act. There can be only one assessment order for one year. The crux of the matter is that where no notice u/s 143(2) is issued within the permissible maximum time, the issuance of Intimation on processing the return u/s 143(1) of the Act, is construed as completion of assessment. However, where such notice is issued, the intimation issued u/s 143(1)(a) loses the character of an assessment order, which in that case, is passed u/s 143(3) after thorough scrutiny. To sum up, an assessment is termed as completed on the passing of an order u/s 143(3) of the Act, but, in a case, where a return has been filed by the assessee, which is processed u/s 143(1), but no further notice u/s 143(2) is issued and the same cannot be issued because of the time limit setting in, the Intimation sent to the assessee u/s 143(1) is also treated as a completed assessment for this purpose.

10. Au contraire, the assessment years having non-completed or pending assessments mean the years for which the assessments were pending on the date of search which are abated in terms of the express provisions of the second proviso to section 153A. This will also embrace the years in respect of which the time limit for issuing notice u/s 143(2) is still available with the AO as on the date of search.

11. Adverting to the extant factual matrix, it is seen that the assessment years under consideration fall in the category of `completed assessments' and not the `pending assessments' abating on the date of search. Both the ld. Members have considered the judgment of the Hon'ble jurisdictional High Court in the case of Kabul Chawla (supra). The facts of that case are that a search was carried out u/s 132 on 15.11.2007 on BPTP Ltd., a leading real estate developer operating all over India and some of its group companies including the premises of the assessee, who owned and controlled the group. No assessment proceedings were pending for the assessment years 2002-03, 2005-06 and 2006-07 as on the date of the search. The assessments for such assessments years had already been made u/s 143(1) of the Act. The assessee filed returns for the three assessment years declaring certain income. The assessments were completed u/s 153A for the concerned assessment years making additions, inter alia, on account of low household withdrawals and deemed deduction u/s 2(22)(e) of the Act. It was submitted before the ld. CIT(A) that no evidence was found during the course of search so as to warrant an addition u/s 2(22)(e) of the Act. The ld. CIT(A) held that the additions need not be restricted only to the seized material. The Tribunal concluded that: 'If some incriminating material is found in respect of such assessment years for which the assessment is not pending, then, the total income would be determined by considering the originally determined income plus income emanating from the incriminating material found during the course of search'. That is how, the additions made u/s 2(22)(e), which were not based on any incriminating material found during the course of search, were held to be unsustainable in law and, hence, deleted. The Hon'ble High Court approved the view

taken by the Tribunal. It summarized the legal position in para 37 of its judgment as under :-

> *`On a conspectus of Section 153A(1) of the Act, read with the provisos thereto, and in the light of the law explained in the aforementioned decisions, the legal position that emerges is as under:*
>
> *i. Once a search takes place under Section 132 of the Act, notice under Section 153 A (1) will have to be mandatorily issued to the person searched requiring him to file returns for six AYs immediately preceding the previous year relevant to the AY in which the search takes place.*
>
> *ii. Assessments and reassessments pending on the date of the search shall abate. The total income for such AYs will have to be computed by the AOs as a fresh exercise.*
>
> *iii. The AO will exercise normal assessment powers in respect of the six years previous to the relevant AY in which the search takes place. The AO has the power to assess and reassess the 'total income' of the aforementioned six years in separate assessment orders for each of the six years. In other words there will be only one assessment order in respect of each of the six AYs "in which both the disclosed and the undisclosed income would be brought to tax".*
>
> *iv. Although Section 153 A does not say that additions should be strictly made on the basis of evidence found in the course of the search, or other post-search material or information available with the AO which can be related to the evidence found, it does not mean that the assessment "can be arbitrary or made without any relevance or nexus with the seized material. Obviously an assessment has to be made under this Section only on the basis of seized material."*
>
> *v. In absence of any incriminating material, the completed assessment can be reiterated and the abated assessment or reassessment can be made. The word 'assess' in Section 153 A is relatable to abated proceedings (i.e. those pending on the date of search) and the word 'reassess' to completed assessment proceedings.*
>
> *vi. Insofar as pending assessments are concerned, the jurisdiction to make the original assessment and the assessment under Section 153A merges into one. Only one assessment shall be made separately for each AY on the basis of the findings of the search and any other material existing or brought on the record of the AO.*
>
> *vii. Completed assessments can be interfered with by the AO while making the assessment under Section 153 A only on the basis of some incriminating material unearthed during the course of search or requisition of documents or undisclosed income or property discovered in the course of search which were not produced or not already disclosed or made known in the course of original assessment.´*

12. It is evident from the above judgment that once a search takes place u/s 132 of the Act, the assessee is obliged to file returns for the six assessment years immediately preceding the previous year relevant to the assessment year in which

the search took place. In so far as the completed assessments as on the date of the search are concerned, the same are to be repeated as increased by certain additions based on incriminating material found during the course of search. In other words, if no incriminating material is found during the course of search, then, the amount of total income determined under the earlier completed assessments, is to be adopted in such fresh assessments u/s 153A without making any further addition.

13. The ld. AM has preferred the judgment in Dayawanti (supra) over Kabul Chawla (supra) by finding it more closer to the facts of the present case. In the case of Dayawanti (supra), a search and seizure operation was carried out on 22.03.2006. The assessee, along with other family members, surrendered Rs.3.5 crore at the time of search as additional income in respect of `business carried on outside the books of account' in connection with production and sale of gutka. She further admitted in her statement not to have any source of income or any bank account. She still further admitted to being proprietor only on record and, in fact, Shri Anup Gupta looked after all the operations along with the help of other family members. Notice u/s 153A was issued requiring the assessee to furnish returns. In response, she filed a photo copy of the return earlier filed u/s 139(1) declaring gross profit of Rs.7.30 lac on sales of Rs.69.28 lac, yielding gross profit rate of 10.55%. Since no proper books of account were presented, the Assessing Officer rejected the book version u/s 145 and estimated the sales at Rs.1 crore. He applied GP rate of 20% and determined total income at Rs.45.90 lac as against the declared income of Rs.2.42 lac. The CIT (A) reduced the gross profit rate to be applied at 12%. Some additions were sustained and others were deleted. The Tribunal rejected the plea of the assessee that since no material was recovered during the course of search, finalized assessments for the periods covered by the block years could not be reopened. The assessee relied on the judgment in the case of Kabul Chawla (supra) and argued that since no incriminating material was found, no additions could be made in respect of the completed assessments. The Hon'ble High Court dismissed the appeals on the ground that the additions were not baseless as these were based on the inferences drawn by the Assessing Officer. It further held that if the element of guess work has some reasonable nexus with the statement recorded and documents seized, then, the additions can be sustained.

14. It is, thus, seen that whereas the judgment in Kabul Chawla (supra) clearly lays down that in the absence of any incriminating material found during the course of search, no fresh addition can be made in respect of completed assessments, the judgment in the case of Smt. Dayawanti (supra) is peculiar to its facts inasmuch as the addition in that case was based on the assessee's statement made at the time of search admitting : `additional income in respect of business carried on outside the books of account in connection with production and sale of gutka'. It was not a case in which no incriminating material was found. Rather the assessee's statement given at the time of search confirming the carrying on of business outside the books of account was extrapolated to the earlier years as well.

15. Turning to the facts of the instant case, it is seen that the Assessing Officer has not disallowed any specific amount of expenses on account of any incriminating material found at the time of search. It is pertinent to note that the assessee incurred

expenses of Rs.95.21 lac for the assessment year 2004-05. What the Assessing Officer has done is to disallow loss of Rs.23.05 lac simply on the ground that the expenses incurred by the assessee were not fully verifiable. It is not even a case of disallowing any particular amount of expense for whatever reason. Thus, it is manifest that only a part of the expenses, representing loss of Rs.23.05 lac, were disallowed and that too, on the ground that complete details in respect of the expenses incurred were not furnished by the assessee during the course of proceedings u/s 153A of the Act. Similar is the position for the assessment year 2005-06 in which the assessee incurred expenses of Rs.1.31 crore and claimed loss of Rs.23.59 lac. The Assessing Officer, in the proceedings u/s 153A, reduced such loss to Rs. Nil, thereby implying that only a part of the expenses to the extent of the amount of loss, was disallowed for non-furnishing of necessary details in support of expenses. The crux of the matter is that only a part of the expenses representing loss for the assessment years 2004-05 and 2005-06 was disallowed and not allowed to be carried forward for set off against the income for assessment year 2006-07 simply on the ground that expenses were not fully verifiable since complete details were not furnished during the course of assessment proceedings.

16. Admittedly, assessments for the A.Ys. 2004-05 and 2005-06 stood completed on the date of search. The amount of loss finally determined for the A.Y. 2004-05 in the original assessment was Rs.23,05,880/-. Similarly, the amount of loss finally determined by the AO in the original assessment order passed u/s 143(3) on 30.11.2007 for the assessment year 2005-06 was Rs.18,17,685/-. In the fresh assessments u/s 153A, the Assessing Officer was authorized to repeat the originally assessed income (loss) plus fresh additions, if any, based on the incriminating material found at the time of search. Admittedly, no incriminating material was found in respect of the assessment years under consideration. There is no reference whatsoever to any incriminating material found during the course of search casting shadow of doubt on the genuineness of such expenses. Since these expenses were claimed as deduction in the original returns and the Assessing Officer accepted the loss so declared except for making some modification for the assessment year 2005-06, the AO was supposed to restrict his exercise of completing assessments u/s 153A only to the amount of income/loss determined originally. It was not open to him to venture to re-examine the details in respect of expenses in assessment proceedings u/s 153A read with section 143(3) of the Act for the patent reason that, admittedly, no incriminating material in respect of such expenses was found during the course of search.

17. The contention of the ld. DR that there was some incriminating material for subsequent years and the same should be considered to have bearing on the disallowance of loss for the two years under consideration, is incapable of acceptance for more than one reason. Firstly, the existence of an incriminating material for the relevant year is sine qua non for making any disallowance of expenses in respect of the completed assessments. The Hon'ble Supreme Court in CIT VS. Sinhgad Technical Education Society (2017) 397 ITR 344 (SC) has accentuated the relevance of the incriminating material pertaining to the relevant year alone, though in the context of section 153C of the Act. In that case, it has been held that where the incriminating material was found to be pertaining to a particular year, there was no valid

satisfaction for the other years. Secondly, it is not even a case in which some incriminating material indicating recording of bogus expenses in the subsequent years was found, which could have reflection on the years in question. The ld. DR has not drawn my attention towards any part of the statement u/s 132(4) of the assessee, which suggests, even remotely, that the assessee was booking bogus expenses in its books of account for the succeeding years, so as to extrapolate the same to the years under consideration. The trump card of the Department's case is the ratio of Dayawanti (supra), which could have been applied only if the Revenue had established the recording of some bogus expenses by the assessee in later years, so as to enable it to draw an adverse inference for the current years. This is absent in the facts and circumstances of the case. Thus, it is vivid that the ratio decidendi in the case of Dayawanti (supra) does not apply to the facts of the case. In the absence of any material, the genuineness of expenses incurred by the assessee, and that too partly to the extent of losses claimed, could not have been disturbed by the Assessing Officer in the assessment u/s 153A of the Act. Be that as it may, it is further relevant to note that the operation of the judgment in the case of Dayawanti (supra) has been stayed by the Hon'ble Supreme Court vide its judgment dated 03.10.2018, a copy of which has been placed on record.

18. Thus, it is apparent that between the two judgments of Kabul Chawla (supra) and Dayawanti (supra), the facts and circumstances of the instant case are fully covered by the ratio in the case of Kabul Chawla (supra), which view has been reiterated by the Hon'ble Delhi High Court in a more recent decision in Principal CIT vs. Meeta Gutgutia (2017) 395 ITR 526 (Del). In view of the foregoing discussion, I agree with the view canvassed by the ld. JM in holding that the amount of determined loss for the assessment years 2004-05 and 2005-06 be allowed to be carried forward for set off against the income for the assessment year 2006-07. The question proposed is, therefore, answered in negative by holding that the ld. CIT(A) was not justified in upholding the additions made by the AO for the years of completed assessments, which were not based on any incriminating material found during the course of search relating to such years and consequently denying the benefit of carry forward and set off of the resultant loss in subsequent year.

19. The Registry of the Tribunal is directed to list this matter before the Division Bench for passing an order in accordance with the majority view."

(E) Respectfully following the decision of Hon'ble Delhi High Court in the case of Kabul Chawla vs. CIT (supra) and order of ITAT, Delhi in the case of H.B.N. Dairies & Allied (supra); we also decide the issue in favour of the assessee, in the present appeal before us. Accordingly, the aforesaid additions stand deleted.

(F) In the result, for statistical purposes appeal is allowed.

Order pronounced in the Open Court on 26/11/19.

Sd/-	Sd/-
(AMIT SHUKLA)	**(ANADEE NATH MISSHRA)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Dated: 26/11/19
Pooja/-
Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI

Date of dictation	
Date on which the typed draft is placed before the dictating Member	
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr. PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr. PS/PS	
Date on which the final order is uploaded on the website of ITAT	
Date on which the file goes to the Bench Clerk	
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	